United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7245

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

NO. 76-7245

P/S

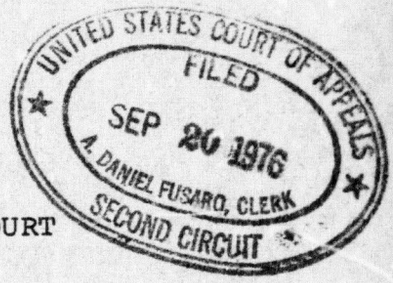
SCOA INDUSTRIES INC.,

Plaintiff-Appellant,

v.

FAMOLARE, INC.,

Defendant-Appellee.



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
The Honorable Inzer B. Wyatt, Judge

DEFENDANT-APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCOA INDUSTRIES INC.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 76-7245
FAMOLARE, INC.,	:	Appeal in 75 Civ. 3357 (S.D.N.Y.)
Defendant-Appellee.	:	

DEFENDANT-APPELLEE'S BRIEF

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in issuing the Preliminary Injunction?

2. Are the findings of fact entered by the District Court clearly erroneous?

3. Was SCOA denied any opportunity to be heard?

STATEMENT OF THE CASE

I. INTRODUCTORY STATEMENT

This is an appeal by plaintiff SCOA Industries Inc. ("SCOA") from an order granting a preliminary injunction which enjoined SCOA from infringing a registered trademark of defendant Famolare, Inc. ("Famolare").

The action below is a declaratory judgment action involving Famolare's unique patented shoes with wavy bottom soles which have been advertised and sold by Famolare under its registered trademark "Get There" (17a, 125a-141a).* On April 21, 1976, the District Court for the Southern District of New York (Hon. Inzer B. Wyatt) entered a preliminary injunction restraining SCOA from using or applying Famolare's trademark "Get There" in connection with the sale of shoes (181a-182a). On May 18, 1976, SCOA appealed from the order granting that preliminary injunction.

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* Pages of the Joint Appendix are cited herein as (___a). Pages of the Brief For Plaintiff-Appellant are cited herein as (Br. ___).

II. STATEMENT OF FACTS

A. Summary Of Facts

The preliminary injunction did not issue (as asserted by SCOA - Br. i, and 11-12) on the basis of "an isolated instance of trademark infringement as to which no likelihood of repetition appears". The following facts provided a sound basis for and fully warranted the issuance of that preliminary injunction:

(1) Famolare's "Get There" shoes are promoted and sold throughout the United States and are asked for by the purchasing public by the name "Get There";

(2) SCOA used Famolare's "Get There" registered trademark in SCOA's advertisement in the January 22, 1976 issue of The Visalia Times Delta;

(3) SCOA's shoes are close copies of Famolare's "Get There" shoes, are of inferior quality and are sold at a significantly lower price than Famolare's "Get There" shoes;

(4) SCOA has a practice of using the trademarks of others, including Famolare's "Get There" registered trademark, internally to refer to similar shoes sold by SCOA;

(5) SCOA has orally misrepresented its shoes as "Get There" shoes;

(6) SCOA opposed Famolare's motion for the preliminary injunction on the basis of affidavits but refused to produce those affiants before the Court at the hearing on that motion;

(7) SCOA continues to seek a declaratory judgment adverse to Famolare's trademarks, including its "Get There" registered trademark; and

(8) SCOA has sought (unsuccessfully) to elicit deposition testimony herein to invalidate Famolare's "Get There" registered trademark.

The sum of those eight facts firmly supported the Court's conclusion that "Famolare has shown that it may suffer greater irreparable injury from the denial of preliminary injunctive relief than any hardship to SCOA from the granting of such relief" (188a), i.e., the conclusion that there was a likelihood of repetition.

The correctness of that conclusion has been borne out by subsequent events. Three separate SCOA stores subsequently misrepresented orally to customers that SCOA's shoes were "Get There" shoes. Those subsequent repetitions are the basis of a motion for contempt now pending in the Court below.*

B. The Facts

On July 8, 1975, SCOA filed its complaint seeking, inter alia, a declaratory judgment that "defendant [Famolare] has no proprietary trademark ... rights that are valid, enforceable and infringed by plaintiff [SCOA] directly or indirectly" (6a). Famolare's "Get There" trademark was registered in March 1975, prior to

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* The three affidavits establishing those violations and submitted in support of the contempt motion are attached hereto.

the commencement of this action in July 1975, and thus was encompassed within the declaratory judgment sought by SCOA (17a, 2a). Famolare counterclaimed for infringement of its registered trademark "Get There" (12a-14a) and SCOA, in its reply,* specifically denied the validity and infringement of that trademark.

SCOA deposed Famolare's President, Joseph P. Famolare, Jr., and attempted (unsuccessfully) to establish that the "Get There" trademark was descriptive, and therefore invalid (159a, 157a).

On February 27, 1976, Famolare obtained an Order To Show Cause (11a) why a preliminary injunction should not be entered restraining SCOA from infringing Famolare's "Get There" trademark. That order was based upon the affidavit of Carle C. Conway, Famolare's Vice President (125a) and SCOA's advertisement in the January 22, 1976 Visalia Times Delta of SCOA's shoe with a wavy bottom sole as a shoe "WITH GET THERE SOLE" (167a). Mr. Conway had received that advertisement in the first week of February 1976 from one of Famolare's salesmen (126a).

On March 4, 1976, SCOA filed its opposition to the application for a preliminary injunction. That opposition was based upon the affidavits of Mr. Anderson, the Manager of

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* Filed May 11, 1976.

the Visalia, California, SCOA store* that placed the advertisement (18a); Mr. Montoya, the Assistant Manager of that store (21a); Mr. Ross, SCOA's Operations Manager for the West Coast (25a), and Mr. Thall, SCOA's Manager of Advertising, Sales Promotion and Display (24a). The gist of those affidavits was that the use of Famolare's "Get There" trademark in the January 22, 1976 advertisement was contrary to the instructions given by Mr. Anderson to the promotion manager of The Visalia Times Delta, Mr. Cislini - i.e., it was all Mr. Cislini's fault. SCOA also filed the affidavit of Mr. Cislini (22a) which did not mention any instruction from Mr. Anderson not to use Famolare's "Get There" trademark. On the contrary, Mr. Cislini's affidavit stated that Mr. Anderson gave to him a pre-printed shoe illustration, price and border for the advertisement and that the remaining copy "was given to me orally by Mr. Anderson" (22a-23a).

On March 11, 1976, Famolare served notices with attendant document requests for the depositions of plaintiff SCOA's managing agents Messrs. Anderson, Ross and Thall. Those depositions were noticed to be taken in New York City on March 16, 1976 (35a-46a). On March 16, 1976, Famolare obtained the further affidavit of Mr. Cislini which stated that he did not recall any instruction from Mr. Anderson not

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* SCOA does business under the name "Gallenkamp" shoe stores (169a).

to use the name "Get There" and that he was confident that, if he had been so instructed, he would not have used it (142a).

SCOA could not produce the documents requested in aid of the depositions of its managing agents until March 22, 1976* and those depositions were adjourned accordingly (162a-164a).

On March 22, 1976, some of the requested documents were produced by SCOA. On March 23, 1976, copies of those documents were received and reviewed by Famolare's attorney, who then called SCOA's attorney on March 24, 1976 and requested that Messrs. Anderson, Ross and Thall appear at the hearing on the application for the preliminary injunction, then scheduled for March 26, 1976.** SCOA's attorney refused to have those SCOA affiants appear at the hearing, notwithstanding that he had not checked their availability, that SCOA is plaintiff herein, that each of those affiants is a managing agent of SCOA and that the issues to be decided at the hearing involved their credibility (162a-164a).

On March 25, 1976, Famolare's attorney offered to stipulate to an adjournment of the hearing if SCOA would agree to produce those affiants at the adjourned hearing.

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* Stipulation and Order entered March 17, 1976.

** Famolare's attorney stated that this request could be considered either as an adjournment of the notices of taking the depositions of those affiants to the courtroom at the hearing or as a demand for the appearance of those affiants at that hearing (163a).

SCOA's attorney did not accept that offer (157a-158a). On the same day, SCOA's attorney for the first time inquired if Famolare would call any witnesses at the hearing. Famolare's attorney informed SCOA's attorney that Famolare would call Paula Shepherd and that she would testify that SCOA's Visalia, California, shoe store had palmed off SCOA's shoe as a "Get There" shoe (166a). SCOA's attorney did not request any further information nor did he ask for an adjournment of the hearing.

At the hearing before Judge Wyatt on March 26, 1976, Famolare called Mrs. Paula Shepherd. Mrs. Shepherd testified that she is employed as assistant bookkeeper at Dick Parker Shoes, Visalia, California (52a). She also does some sales work (52a). Dick Parker Shoes sells Famolare's "Get There" shoes. It is the best seller in the Dick Parker shoe stores and the majority of persons who purchase those shoes ask for them by their name "Get There" (52a-53a). On February 5 or 6, 1976,* she was asked by Mr. Parker (the owner of Dick Parker Shoes) to visit SCOA's Gallenkamp shoe store in Visalia and to purchase a pair of shoes that would be in appearance like Famolare's "Get There" shoe, but not to say the "Get There" shoe (53a).

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* Shortly after SCOA's Gallenkamp store in Visalia advertised SCOA's shoes "WITH GET THERE SOLE" in the January 22, 1976 Visalia Times Delta (167a).

On February 6, 1976, Mrs. Shepherd and her friend, Melinda Morris, went to SCOA's store. Mrs. Shepherd asked the salesman if she could purchase a shoe with the wavy sole that was in the window. She pointed to it and asked "What is the name of that shoe?". The salesman said "The 'Get There'". She tried them on and told the salesman she would buy them. She asked him again what the name of the shoe was and he said "Get There". When she was paying for the shoes, she asked the salesman if he could write the name of the shoe down so she wouldn't forget it and the salesman wrote on the shoe box (54a).

The shoe box and the shoes purchased by Mrs. Shepherd were received in evidence (55a; 119a-121a). The top of the shoe box has the words "Get Their's" written in pencil (119a-120a). Mrs. Shepherd testified that the salesman said that he didn't know how to spell it and after making an erasure spelled it incorrectly (57a).

The SCOA shoe purchased by Mrs. Shepherd was found by the Court to be a close copy of Famolare's "Get There" shoe (Cf. 121a and 123a; 186a). Mrs. Shepherd testified that the SCOA shoe she purchased compared very poorly to Famolare's "Get There" shoe, SCOA's shoe being made of vinyl and Famolare's "Get There" shoe being made of leather (59a-60a). The SCOA shoe sold for $15.99 and the Famolare "Get There" shoe for about $30.00 (60a).

The Court found that the SCOA shoe was of inferior quality and sold at a significantly lower price than Famolare's "Get There" shoe (186a).

Notwithstanding SCOA's full cross-examination of Mrs. Shepherd (62a-71a), the Court specifically found that Mrs. Shepherd was a credible witness and accepted her testimony as true (186a).

The affidavit of Melinda Morris, Mrs. Shepherd's friend who accompanied her to the SCOA shoe store, was found by the Court to fully corroborate Mrs. Shepherd's testimony (124a, 186a).

Internal documents of SCOA, including its Norrwock Shoe Division and Norrwock Shoe Company, were received in evidence. Those documents established that SCOA had used "Get There" in internal correspondence to designate SCOA shoes having wavy bottom soles (79a-80a; 147a-150a). Those documents also established that SCOA had made internal use of registered trademarks of other shoe companies in a similar fashion (81a-84a; 151a-156a).*

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* Both "The Earth Shoe" and "Wallabees" are registered trademarks of others for shoes (152a-153a). On November 7, 1975, Mr. Thall wrote to Mr. Ross (two of SCOA's affiants) and told him not to use the word "Earth" (151a). In December 1975, Mr. Ross sent a "Calendarof Events" to his store managers (27a), which read (33a):

"Thursday, December 4th thru Sunday, December 7th

'AUSSIE BOOTS' Family Wallaby Promotion

'SUPER NATURAL' Earth Shoe Promotion"

The Court found that the internal use by SCOA of trademarks belonging to others leads to incidents such as occurred in Visalia, California (186a).

SCOA did not call any witnesses, choosing to rely on the affidavits it submitted (87a). The Court denied a request by SCOA to adjourn the hearing so SCOA could identify and locate the salesman who dealt with Mrs. Shepherd (97a and 100a).

The Court then ruled that a preliminary injunction should issue (88a), finding that SCOA had deliberately infringed Famolare's "Get There" registered trademark (95a-96a and 101a). The Court directed Famolare to submit a proposed preliminary injunction and proposed findings on notice to SCOA (104a).

After Famolare submitted a proposed injunction and proposed findings (181a-188a), SCOA on April 21, 1976 submitted its proposed injunction and its proposed findings (168a-171a). At the same time, SCOA filed a motion for rehearing and reargument of Judge Wyatt's oral decision (189a). That motion relied in part* on the affidavit of Dennis S. Moreno, the clerk who apparently dealt with Mrs. Shepherd (172a-173a). Mr. Moreno's affidavit executed on April 6, 1976 purported to recall his oral conversation with Mrs. Shepherd

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* See page 2 of SCOA's motion filed April 21, 1976

that took place two (2) months before on February 6, 1976. A shoe clerk has numerous oral conversations with customers on a daily basis. Yet no reason is given for why Mr. Moreno would recall that particular conversation with Mrs. Shepherd.

According to Mr. Moreno, Mrs. Shepherd had pointed to the wavy sole in the window and asked him "is that the Get There shoe" (172a). His affidavit states "I did not volunteer the use of the name 'Get There', inasmuch as we do not advertise ... our wavy sole shoe at [sic] being a 'Get There' shoe" (172a). But just two weeks before Mrs. Shepherd visited SCOA's Gallenkamp store, an advertisement of that same store for shoes "WITH GET THERE SOLE" had been carried in the local newspaper (167a). Mr. Moreno also says that Mrs. Shepherd asked him to write the name of the shoe she had asked for on the box "because she wanted to know what to call it when she went to look for it elsewhere" (173a). Why would she want to know what to call it when, according to Mr. Moreno, she was the one who first mentioned the name "Get There"?

On April 21, 1976, the Court below denied SCOA's motion for rehearing and reargument of its oral decision (190a) and entered the proposed findings and preliminary injunction submitted by Famolare as revised by the Court (181a-188a).

ARGUMENT

I. THE PRELIMINARY INJUNCTION WAS PROPERLY GRANTED

SCOA argues that the preliminary injunction was based only on an isolated instance of infringement, i.e., the advertisement placed by Mr. Anderson in The Visalia Times Delta (Br. 11-12). Not so. As we have pointed out, supra, pp. 3-4, the preliminary injunction was firmly supported by the following eight facts:

(1) Famolare's "Get There" shoes are promoted and sold throughout the United States and are asked for by the purchasing public by the name "Get There";

(2) SCOA used Famolare's "Get There" registered trademark in SCOA's advertisement in the January 22, 1976 issue of The Visalia Times Delta;

(3) SCOA's shoes are close copies of Famolare's "Get There" shoes, are of inferior quality and are sold at a significantly lower price than Famolare's "Get There" shoes;

(4) SCOA has a practice of using the trademarks of others, including Famolare's "Get There" registered trademark, internally to refer to similar shoes sold by SCOA;

(5) SCOA has orally misrepresented its shoes as "Get There" shoes;

(6) SCOA opposed Famolare's motion for the preliminary injunction on the basis of affidavits but refused to produce those affiants before the Court at the hearing on that motion;

(7) SCOA continues to seek a declaratory judgment adverse to Famolare's trademarks, including its "Get There" registered trademark; and

(8) SCOA has sought (unsuccessfully) to elicit deposition testimony herein to invalidate Famolare's "Get There" registered trademark.

It was on these facts that the Court concluded that "Famolare has shown that it may suffer greater irreparable injury from the denial of preliminary injunctive relief than any hardship to SCOA from the granting of such relief" (183a). It was also on these facts that the Court concluded that "defendant [Famolare] has shown that it has a reasonable likelihood of ultimately prevailing on the merits" (183a). As this Court stated in Hills Bros. Coffee, Inc. v. Hills Supermarkets, Inc., 428 F.2d 379, 380 (2 Cir. 1970):

> "To obtain a preliminary injunction, a plaintiff in a trademark infringement suit must show probability of success on trial and irreparable damage resulting from a denial of the injunction. W.E. Bassett Co. v. Revlon, Inc., 354 F.2d 868 (2d Cir. 1966)."

SCOA argues (Br. 12) that "[f]rom the affidavit of the newspaper promotion manager, Cislini, that he does not recall being told not to use the term 'Get There' (90a, 91a, 142a), Judge Wyatt speculated that the newspaper employee would not have used it unless he were so instructed."

Judge Wyatt did not speculate. He found that SCOA's store manager (Mr. Anderson) told Mr. Cislini to use the name "Get There" in the advertisement and did so deliberately

(187a, finding 15). That finding was not based, as SCOA implies, on the second affidavit of Mr. Cislini (142a), but on his first affidavit (22a) which SCOA itself submitted. In that first affidavit Mr. Cislini swore that Mr. Anderson gave to him a pre-printed shoe illustration, price and border and that the remaining copy "was given to me orally by Mr. Anderson" (23a). Judge Wyatt specifically relied on that sworn statement in making that finding (90a and 187a). In finding that this infringement was deliberate the Court also relied upon the fact that SCOA refused to produce Mr. Anderson for examination before the Court (187a). As the Supreme Court observed in Interstate Circuit v. U.S., 306 U.S. 208 (1939), the failure of a corporate party to call employees having peculiar knowledge of the facts "is itself persuasive that their testimony, if given, would have been unfavorable ..." (p. 226). To the same effect is J. Gerber & Company v. S.S. Sabine Howaldt, 437 F.2d 580, 593 (2 Cir. 1971).

Furthermore, SCOA is in no position to complain that the Court accepted the affidavit of Mr. Cislini that SCOA submitted. As this Court stated in Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197, 1205 (2 Cir. 1970):

> "A party who chooses to gamble on that procedure [affidavits] cannot be heard to complain of it when the decision is adverse."

SCOA also argues (Br. 14-15) that the preliminary injunction should not have issued because there was no likelihood of repetition. Notwithstanding SCOA's protestations to the contrary, the scene was set for repetitions.

Famolare had promoted and sold its "Get There" shoes throughout the United States. Famolare's sales were about $30,000,000 a year, approximately half of which were sales of "Get There" shoes. People were asking for them by the name "Get There" (184a-185a).

Against this background, SCOA was selling shoes which, as the Court found, were close copies of Famolare's "Get There" shoes, were of inferior quality and were sold by SCOA at a significantly lower price than Famolare's "Get There" shoes (186a). And as we have observed, SCOA in internal communications referred to their close copies as "Get There" shoes (147a-150a). A very dangerous situation for repeated violations.

SCOA says that 90% of its advertising is standardized (Br. 5), which means that 10% are left up to the local store manager who is permitted to place "unauthorized ads" as Mr. Anderson did. SCOA's attorney conceded at the hearing that "there is a limit as to how this can be policed" (95a). SCOA has approximately 300 stores (Br. 4) with young clerks such as Moreno (Br. 1) who communicate orally with the purchasing public on a daily basis.

To say, as SCOA's attorney said at the hearing "This will not happen again" (94a) would be to ignore the realities of the situation. The Court below recognized that situation:

> "THE COURT: I think that when people are shown to have deliberately infringed a trademark of 'Get-There,' it seems to me that injury has been shown. They show me that the shoes differ in quality, they differ in price, that Famolare has spent a lot of money exploiting the mark 'Get-There.' That is shown by the way it's thrown around in the internal documents of Scoa. They evidently know it very well, and I see not the slighest [sic] reason why they shouldn't have an injunction." (95a-96a)

Similar facts were alluded to in Tefal, S.A. v. Products Intern. Co., 529 F.2d 495, 497-498 (3 Cir. 1976), where the Court affirmed a preliminary injunction:

> "If, as appears, plaintiffs' products have the superior characteristics alleged, it may well damage plaintiffs' good will if customers purchase defendants' products assuming they have acquired plaintiffs' products. Certainly, the risk is sufficiently substantial to fulfill the requirement of interim irreparable injury in the trademark context. See George Washington Mint v. Washington Mint, 349 F. Supp. 255 (S.D.N.Y. 1972)."

The law in this Circuit is the same - substantial risk of irreparable injury to good will and reputation is sufficient to support a preliminary injunction for trademark

infringement. Hills Bros. Coffee, Inc. v. Hills Supermarkets, Inc., 428 F.2d 379, 381 (2 Cir. 1970).

The Court below was fully justified in concluding that "Famolare has shown that it may suffer greater irreparable injury from the denial of preliminary injunctive relief than any hardship to SCOA from the granting of such relief" (188a).

Subsequent to the entry of the preliminary injunction, three separate SCOA stores have misrepresented orally to customers that SCOA's shoes were "Get There" shoes.*

Surely, the Court below did not abuse its discretion in granting the preliminary injunction. That is the test here. Alabama v. United States, 279 U.S. 229, 230-1 (1929). As this Court held in Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495, 500 (2 Cir. 1962):

> "The granting of a preliminary injunction pending final hearing is within the sound discretion of the trial court, and such an order will be reversed on appeal only upon a showing of abuse of that discretion or a violation of some rule of equity. Alabama v. United States, 279 U.S. 229, 49 S.Ct. 266, 73 L.Ed. 675 (1929); Prendergast v. New York Tel. Co., 262 U.S. 43, 43 S.Ct. 466, 67 L.Ed. 853 (1923); Pratt v. Stout, 85 F.2d 172, 176 (8 Cir. 1936). ... Furthermore, although catastrophic harm to the plaintiff was unlikely if the preliminary injunction were denied, some harm was probable and the harm so caused was likely to be irreparable. ... [I]t is dubious that the grant of the injunction will harm the defendant significantly more than the denial of it would have harmed the plaintiff."

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* The three affidavits attached hereto establishing those violations have been filed in the Court below in support of Famolare's pending contempt motion.

The cases cited by SCOA (Br. 12-16) simply stand for the proposition that a preliminary injunction will not issue where there is no likelihood of repetition. As we have demonstrated, there was ample likelihood of repetition here and the prophecy was fulfilled.

II. THE FINDINGS OF FACT ARE FULLY SUPPORTED BY THE EVIDENCE

As this Court stated in Roman Products Corp. v. DiCrasto Dairy & Food Products, Inc., 361 F.2d 599, 601 (2 Cir. 1966), findings are not clearly erroneous when "the Court is satisfied that there exists in the record a credible factual basis to support the trial court's findings."

There is a credible factual basis on this record to fully support all of the District Court's findings. Both SCOA and Famolare submitted findings to the Court (168a-171a and 184a-187a) and the Court revised those submitted by Famolare before entering them. Clearly, the Court reviewed those findings carefully (e.g., 187a).

SCOA challenges finding 11, not because it states that SCOA's salesman orally misrepresented to Mrs. Shepherd that SCOA's shoe was a "Get There" shoe and wrote that name (misspelled) on the shoe box, but because it doesn't state that he wrote it at her request. Findings are not rendered erroneous for omitting recitations of evidence. SCOA's "omission" would imply that Mrs. Shepherd asked the salesman

to write "Get There" on the box. She did not (54a, 57a). She never used the words "Get There" when she was in that store (59a). The Melinda Morris affidavit (124a) does in fact fully corroborate Mrs. Shepherd's testimony. The "surprise" objection to that affidavit is the same objection made to Mrs. Shepherd's testimony which is dealt with infra.

SCOA challenges finding 12 because it states that the SCOA shoe sold to Mrs. Shepherd as a "Get There" was a close copy of Famolare's "Get There" shoe. It was in fact sold to her as a "Get There" shoe. The only reason it was blatant misrepresentation rather than only "palming off" was that she didn't ask for "Get There" shoes when she went into the store. SCOA also says that the SCOA shoe was not a "close copy" of Famolare's "Get There" shoe. We invite the Court to compare those two shoes (physical exhibits DX-B and DX-D), as did the Court below (55a-56a and 61a).* SCOA also challenges this finding stating that it is "erroneous in asserting that the Court found that the SCOA shoe was of inferior quality". But that is precisely what the finding says. If SCOA is trying to say it is erroneous because there was no evidence to support that finding, the record is to the contrary. SCOA's shoe was made of plastic

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* The SCOA shoe purchased by Mrs. Shepherd was first submitted to the Court on March 26, 1976 and obviously was not before the Court when it entered its February 1976 decision (7a-10a).

and sold for about $15.00. Famolare's "Get There" shoe was made of leather and sold for about $30.00 (59a-60a).

SCOA challenges finding 13 because it does not state that SCOA has used "Get There" only in internal correspondence. But that would be contrary to the fact that it was used in an advertisement and orally in selling shoes. SCOA also implies that there should have been a finding that this internal use of Famolare's "Get There" trademark by SCOA had been discontinued prior to the January 22, 1976 SCOA advertisement using that trademark. But there was no evidence to support such a finding.*

SCOA challenges finding 15 on the ground that it is not supported by the evidence. We have demonstrated that SCOA's position here is a sham, purposefully ignoring the affidavit of Mr. Cislini submitted by SCOA, supra, pp. 14-15.

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* The documents showing use of "Get There" by SCOA in internal communications are dated in May and June, 1975. This action was commenced by SCOA on July 8, 1975, supra, p. 4. SCOA is not producing its post-suit documents to Famolare.

III. SCOA HAD AN OPPORTUNITY TO BE HEARD

SCOA has the temerity to cite (Br. 20) this Circuit's rule that an evidentiary hearing should be had on a motion for a preliminary injunction where there are issues of fact to be resolved and where credibility is involved. Famolare's attorney cited that very rule (and the supporting cases) in his March 24, 1976 letter to SCOA's attorney (164a) after SCOA's attorney had refused to produce SCOA's affiants at the hearing (163a). As shown supra, p. 7, SCOA's attorney had so refused notwithstanding that he had not checked their availability, that SCOA is plaintiff herein,* that each of those affiants is a managing agent of SCOA and that the issues to be decided at the hearing involved their credibility. One of those affiants, Mr. Anderson, was the manager of the very store in Visalia where the salesman who made the misrepresentation to Mrs. Shepherd was employed.

Also, as pointed out supra, pp. 7-8, Famolare's attorney on the following day (March 25, 1976) offered to stipulate to an adjournment of the hearing if SCOA would agree to produce those affiants at the adjourned hearing. SCOA's attorney did not accept that offer. On the same day,

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* That same letter also cited to SCOA's attorney the general rule that a defendant is entitled to examine a plaintiff in the forum where plaintiff has chosen to sue (164a).

SCOA's attorney for the first time inquired if Famolare would call any witness at the hearing. Famolare's attorney informed him that Famolare would call Paula Shepherd and that she would testify that SCOA's Visalia store had palmed off SCOA's shoe as a "Get There" shoe (166a). SCOA's attorney did not request any further information regarding Mrs. Shepherd nor did he accept the stipulated adjournment offered that day by Famolare's attorney.

The reason is apparent. That stipulated adjournment was offered on the condition that SCOA produce its affiants at the hearing. SCOA's attorney didn't want them there. As he said at the hearing "they could have been here, but they couldn't have helped me here" (73a). SCOA as plaintiff could not refuse to produce an affiant at the hearing who was a managing agent (store manager Anderson) and at the same time expect a hearing to be adjourned so that SCOA could call a clerk from that very same store. The Court was not required to countenance such tactics by a plaintiff.

There was no surprise with regard to Mrs. Shepherd or her testimony. SCOA's attorney was told in advance of the hearing that she would be called as a witness and he was told the substance of her expected testimony. Yet SCOA's attorney did not request an adjournment or accept the adjournment offered to him by Famolare's attorney. Instead,

SCOA chose to proceed with the hearing* and then, when it found it could not impeach Mrs. Shepherd's testimony, ask an over-burdened Court to adjourn the hearing so that SCOA could look for a rebuttal witness. The Court was not required to do so under these circumstances.

Furthermore, SCOA sought rehearing and reargument (before the Court entered its findings and issued the preliminary injunction) based on the affidavit of the clerk, Mr. Moreno, who dealt with Mrs. Shepherd. As we have demonstrated (supra, pp. 11-12), Mr. Moreno's affidavit was not credible. The Court rightfully denied SCOA's motion for rehearing and re-argument and entered its findings and preliminary injunction.

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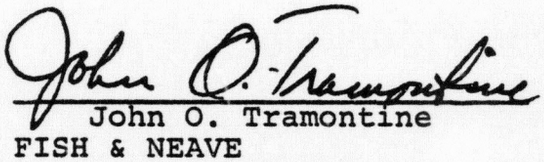
* SCOA had a full and fair opportunity to cross-examine Mrs. Shepherd (62a-71a). That was more than SCOA was willing to permit of its affiants.

IV. CONCLUSION

The facts and the applicable authority compel the conclusion that the District Court's April 21, 1976 preliminary injunction was providently granted and should not be vacated.

Respectfully submitted,

September 20, 1976

By 

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New York, New York 10017
Telephone (212) 826-1050

Attorneys for Defendant-Appellee

OF COUNSEL:

Beverly B. Goodwin
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New York, New York 10017
Telephone (212) 826-1050

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendants.	:	(Judge Wyatt)

AFFIDAVIT OF TASIA PAPAILIAS

STATE OF CALIFORNIA)
) ss.:
COUNTY OF SACRAMENTO)

TASIA PAPAILIAS, being duly sworn, states:

1. I reside at 4129 Boon Lane, Sacramento, California. I am employed as an investigator by the firm of Bob D. Ralls & Co., 831 D Street, Sacramento, California. Bob D. Ralls & Co. is an investigation firm licensed by the State of California.

2. On July 1, 1976, at approximately 8:00 P.M., I entered the Gallenkamp shoe store in the Sunrise Mall, Sacramento, California. The salesman who waited on me was a white adult male, approximately 25 years of age with black hair and brown eyes. I told the salesman that I wanted to see the shoes - motioning with my finger in an up and down wavelike manner. The salesman said "with the wavy soles" and I said "yes".

3. The salesman accompanied me over to the counter display and I picked a pair of shoes out and gave the salesman my size. When the salesman came back with the shoes and before I actually put the shoes on, I asked him if he knew what the shoes were called. He stated "Yeah, these are the Get There

Soles". I asked the salesman why these shoes were called by that name and he said "I guess because they get 'ya there".

4. When I put the shoes on, I asked the salesman if they had men's shoes like those and the salesman asked me "With the Get There Soles?" and I replied "Yes". The salesman then said "Yes, but not in suede, we just have a couple of styles for men." I replied by saying that I thought my husband might like this kind of shoe. I then told the salesman that I wanted to purchase the shoes that I had tried on.

5. The salesman and I walked to the counter and while he was writing out the sales slip I asked him to write down the name of the shoe so I could tell my husband about the shoes. He wrote on the box "Get There heels men's shoes 1210-257". He said that the number that he was writing down on the box was the stock number. I then paid for the shoes and left the store.

6. Attached hereto is the sales slip for the shoes that I purchased as stated above.

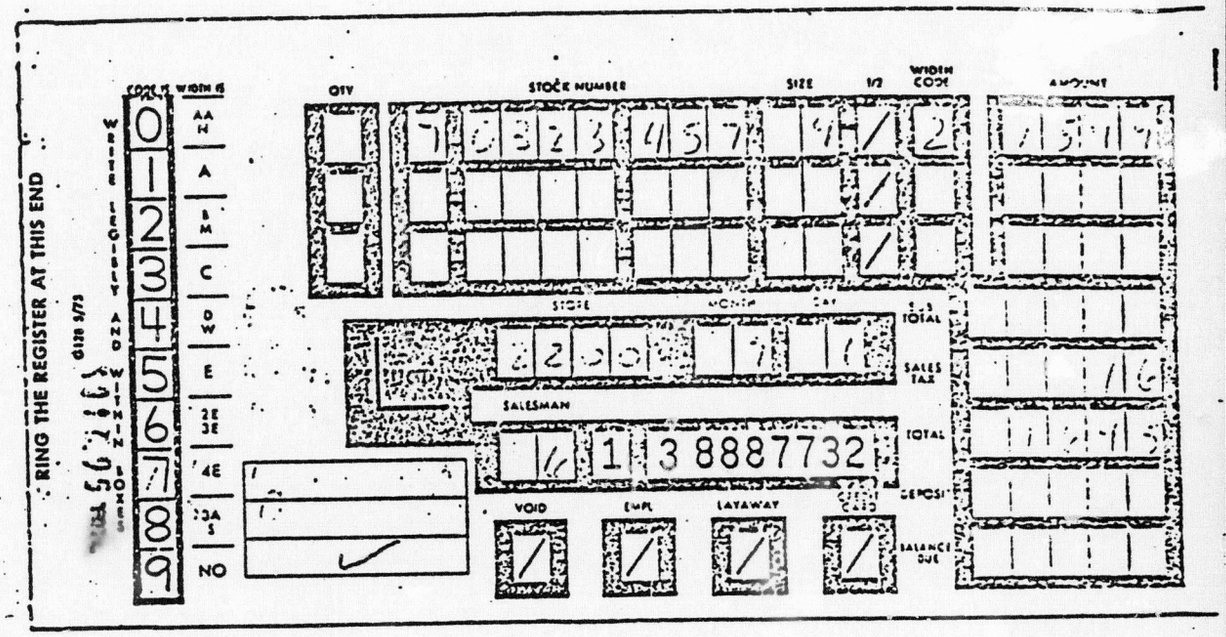
7. I have initialed and forward with this affidavit the top and bottom of the box and the pair of shoes that I purchased as stated above.

Tasia Papailias
Tasia Papailias

Sworn and subscribed to
before me this 15th day
of July, 1976.

Notary Public

OFFICIAL SEAL
FRANKA L. MILLER
NOTARY PUBLIC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BALANCE DUE


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Stores From Coast To Coast
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scoa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

AFFIDAVIT OF JAN DAVIS BEDKE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF SACRAMENTO)

JAN DAVIS BEDKE, being duly sworn, states:

1. I reside at 5059 Pasadena Avenue, Sacramento, California. I manage Legal Services Company, which is located at 831 D Street, Sacramento, and in which I have an interest. Legal Services Company is in the business of microfilming medical records, courthouse filings and process service.

2. On July 8, 1976, at approximately 2 p.m., I entered the Gallenkamp shoe store in the Florin Center Mall, Sacramento, California. The salesman who waited on me was a white adult male, approximately 25 years of age with blond hair named Kevin. I informed him that I was birthday shopping for my teenage daughter who wanted a pair of the latest fashioned shoe that all the kids were wearing.

3. The salesman informed me that "the latest and newest fashion in shoes is the Ripple Sole or the Get There". He left to go to the display counter and returned with two styles to show me. These were oxford type of shoes with a large crepe sole with ripples from the heel to the toes. I stated that they looked like boys shoes and he assured me that girls wear them

with their pants too.

4. I again inquired as to the name of the shoe and the salesman again informed me that "they are called the 'Get There.'" I stated that I would need to check with my daughter as to which style she desired before I could purchase a pair and I departed the store.

Jan Davis Bedke

Sworn and subscribed to before me this 26th day of July, 1976.

Franka L. Miller
Notary Public

OFFICIAL SEAL
FRANKA L. MILLER
NOTARY PUBLIC - CALIFORNIA
Principal Office in YOLO County
My Commission Expires Jan. 29, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

AFFIDAVIT OF JAN DAVIS BEDKE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF SACRAMENTO)

JAN DAVIS BEDKE, being duly sworn, states:

1. I reside at 5059 Pasadena Avenue, Sacramento, California. I manage Legal Services Company, which is located at 831 D Street, Sacramento, and in which I have an interest. Legal Services Company is in the business of microfilming medical records, courthouse filings and process service.

2. On July 9, 1976, at approximately 10:30 a.m., I entered the Gallenkamp shoe store in the Crestview Shopping Center, Sacramento, California. The salesman who waited on me named "Rick" was the only one in the store. I explained to this salesman that I was shopping for my teenage daughter who had to have the latest style in shoes and who had been talking about a shoe with ripply soles made of crepe.

3. I followed the salesman to a display rack and he picked up a pair of rust colored, suede, oxford shoes with large crepe soles with ripples in them. He stated "These are the Get There shoe." During our conversation about the shoe he stated that "the original shoe had four ripples in the sole and GallenKamp made them with five ripples in the sole. There

was some sort of law suit but I guess everything is okay now because we are carrying the ones with the four ripples in the sole again." I checked the display rack and they had the shoe with four ripples and another style with five ripples in the sole.

4. I inquired as to the name of the shoe again and the salesman stated "The Get There shoe." I purchased a pair of tan oxford type and after he had rung the purchase in the register and packaged the box of shoes for me I asked him to write down the style number of the rust colored suede oxford so that if my daughter liked the ones I had just purchased, I could have my husband pick her up a pair of suede ones. He took a GallenKamp business card off the counter and on the back of this card he jotted down the style number and also wrote the name of the shoe "Get There" down for me. I departed the store with my purchase.

5. Attached hereto is the business card referred to in the preceding paragraph and the sales slip for the shoes that I purchased as stated above.

6. I have initialed and forward with this affidavit the GallenKamp business card on which the salesman wrote the style number and name "Get There" as the shoes.

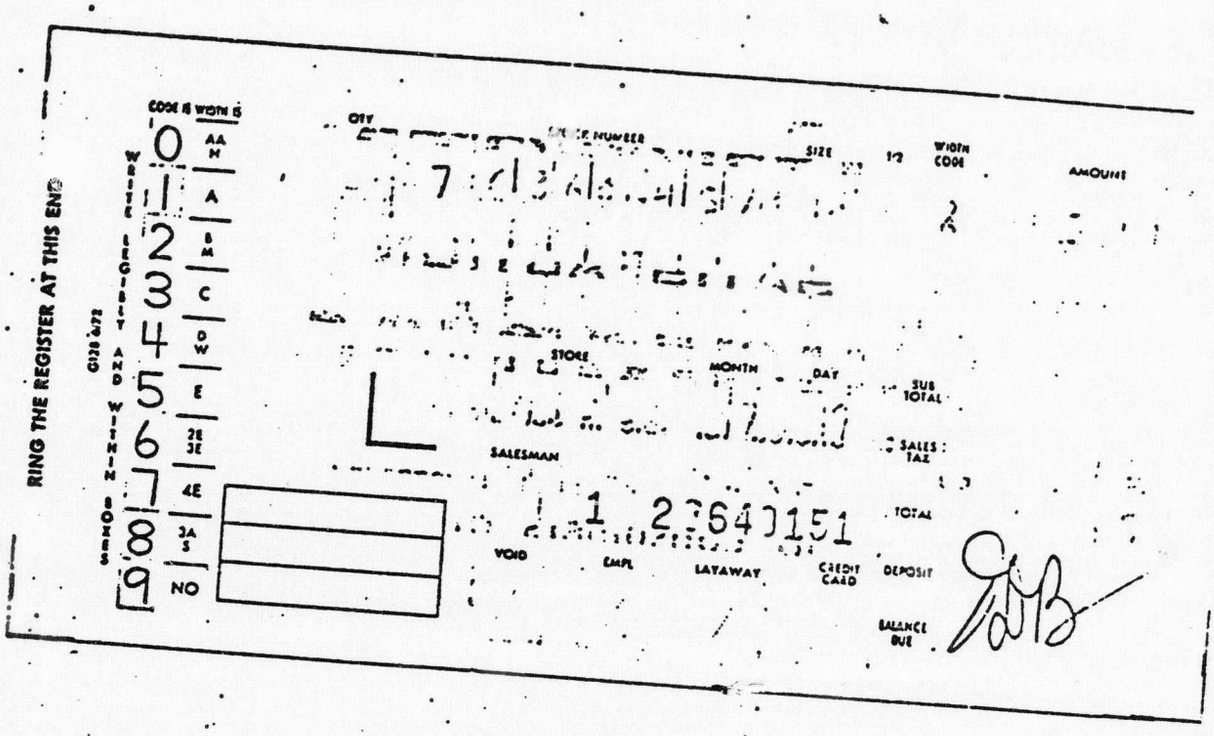
Jan Davis Bedke

Jan Davis Bedke

Sworn and subscribed to
before me this 26th day
of July, 1976.

Notary Public

OFFICIAL SEAL
FRANK L. MILLER
NOTARY PUBLIC CALIFORNIA
My Commission Expires



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